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IN THE

Supreme Court of the United States

No. 539

MARIO JOSEPH PACMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Writ of Certiorari and Brief in Support Thereof.

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IN THE

Supreme Court of the United States

No. .....

MARIO JOSEPH PACMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable United States Supreme Court:

Your petitioner, Mario Joseph Pacman, hereby prays that a writ of certiorari may be granted, directing the Circuit Court of Appeals for the Ninth Circuit to certify to this Court for a review and determination the case of *Mario Joseph Pacman v. Charles B. Mead,* Superintendent of the Federal Prison Camp, Coronado National Forest, Pima County, Arizona, No. 11256, in the United States Circuit Court of Appeals for the Ninth Circuit.

Jurisdictional Statement.

Jurisdiction in this case is conferred by Section 350, United States Codes, Section 311 Title 50, U. S. Codes and Title 28. The petition herein is petitioned from an order of the Ninth Circuit Court of Appeals denying the petitioner a writ of *habeas corpus.*

The appeal is from a judgment of the District Court of the United States, rendered without hearing, denying peti-

tioner his petition for writ of *habeas corpus,* or an order to show cause. (United States Codes, Title 28, Sec. 451.)

The case was decided on September 14, 1945 [R. 77]. Notice of appeal was duly and regularly given and the case was heard in San Francisco on May 21, 1946, and the petition was denied by the Ninth Circuit Court of Appeals on May 28, 1946. Justice Burton duly extended the time within which to file this petition for certiorari to September 27, 1946.

The petition for writ of certiorari to this Court was filed within the time allowed by law and extensions thereof.

Statutes Involved.

Selective Service Regulation, Section 311, Title 50, United States Codes; Selective Service Training Act of 1940, and regulations pursuant thereto, Regulation 601.5; Regulation 628.1; Regulation 642.2; Regulation 642.3 of the 1942 Selective Service Regulations; the due process clause contained in the Fifth Amendment to the Constitution of the United States; First Amendment to the Constitution of the United States.

The Importance of the Questions Involved.

It is important that this Honorable Court grant certiorari and annul the judgment of conviction because an important question of procedure in criminal administrative law is involved, and particularly, the right of a person notified that he is to be inducted into the military service having the right to exhaust his administrative remedies before he is liable to a criminal prosecution.

The decision of the Circuit Court of Appeals under which the petitioner stands convicted is in conflict with

the generally accepted practice of administrative law to permit the exhaustion of administrative procedure on appeal before a person is liable to criminal prosecution.

At the time of the denial of the petitioner's claims in his efforts to present his case to the jury, the courts were then guided by a rule of practice that the administrative remedies would not be inquired into which deprived the accused of any opportuntiy to present any challenge of the procedure before the administrative agency.

The petitioner, although having served the confinement meted out to him, and being under conditional release, is attacking the validity of the judgment by the extraordinary remedy of *habeas corpus,* in order that his name may be cleared, as he was a former employee of the State of California and cannot return to his former position unless his name is cleared.

If, therefore, he was prosecuted before he had an opportunity to exhaust his administrative remedies and before those administrative remedies were final, the petitioner could not be found guilty of wilful violation of the state.

The importance of re-defining the rights of draftees in the light of the termination of the war makes this case important.

Furthermore, the determination of the right to prosecute prior to the conclusion of administrative rights, is important.

Questions Presented.

1. Whether a person who is ordered to report for induction into the military service of the United States and who is 39 years of age, and whose religious beliefs entitle him to a specific classification is guilty of *wilful* violation of an order to report for induction before his administrative remedies have been exhausted with the local Board and while his case is on appeal with the State Director of Selective Service.

2. Whether the failure of both the trial court and the administrative agencies to grant petitioner a hearing on his petition for consideration as to whether there had been a mistake by the local Selective Service Board, and the return of an indictment before the exhaustion of administrative remedies was not premature.

3. Whether the Government acted arbitrarily and denied the petitioner due process of law in failing to grant him a hearing on the merits of his complaint upon the basis of his petition in the District Court.

Statement of the Case.

The petitioner was and is a conscientious objector with strong religious tenets, entitling him to the protection of the First Amendment of the Constitution of the United States. His briefs, his record and petition in the District Court were prepared by himself and express strongly his religious tenets.

Petitioner was classified as 1-A-O, and after such classification his draft appeal board decided that he was not entitled to any classification other than 4-E, but reserved judgment as to 4-E classification until it received a report

from the Department of Justice [R. 7]. The appeal board gave the sole reason for denying petitioner the 4-E classification that it had received a letter from the Department of Justice. The representative of the Department of Justice had called the defendant before him and had later made a report which the petitioner had no means of knowing about or rebutting and it was based on this letter that the Board denied the petitioner his reclassification into 4-E.

On September 1, 1942, petitioner received a 1-A-O classification. The next day he went to the office of his draft board and examined the report of the Department of Justice, at which time he discovered it relied upon information received from persons who did not know petitioner during his adulthood and had not even seen the petitioner for eighteen years, and whose motives petitioner believed were not entitled to belief.

On September 2, 1942, petitioner informed the draft board by telegram that he desired a stay until word could be received from the National or State Directors, and he then prepared a refutation of the statements contained in the letter from the Department of Justice.

On September 3 and while this appeal was pending, the induction order was issued and received by the petitioner on September 4. On the day of receipt, petitioner immediately sent identical telegrams to the National and State Directors, which stated that he would "appreciate a stay of induction pending review which I shall respect" [R.

9]. On September 5, the petitioner received from the State Selective Service Director, in answer to his telegram, the following: "Reurtel. Upon Receipt Your Correspondence. Will Give Matter Consideration and Determine Appropriate Action. K. H. Leitch State Director of Selective Service."

Petitioner, relying on this wire did not report for induction and on September 15 received a notice of suspected delinquency. Petitioner immediately contacted the local board but was arbitrarily denied any consideration. He then contacted the United States Attorney on September 17, sent them a registered letter and received no answer [R. 10]. The petitioner was arrested and charged with wilful disobedience of an induction order, and apprehended and taken before the United States Commissioner three days later; who gave him an opportunity to volunteer, without qualification.

Petitioner was thus told that if he waived all of his religious scruples, the indictment would be dismissed. Otherwise he would be prosecuted for wilful intent.

Petitioner at all times requested and was willing to accept a medical assignment and it was denied [R. 12].

Grounds for Granting the Writ of Certiorari.

1. The District Court and Circuit Court of Appeals erred in holding that the petitioner's conviction of the offense was not error, in view of the fact that the administrative remedies had not been exhausted.

2. The District Court acted specially, arbitrarily and capriciously in denying the petitioner an order to show cause on his application for a writ of *habeas corpus,* without a hearing. The facts were sufficient to warrant the granting of a hearing to permit the presentation of all of the evidence attacking the validity, and due process or lack of due process under which the judgment was obtained.

3. The evidence shows that the defendant was not guilty of any offense at all and, therefore, was denied due process of law guaranteed by the Fifth Amendment to the Constitution of the United States. Such denial entitles the petitioner to granting of the writ of certiorari.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

No. .....

MARIO JOSEPH PACMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Judgment in This Case Is Void Under the Doctrine Enunciated by This Court in Estep v. U. S., and Smith v. U. S., October Term, 1945, Cases 292 and 66.

The petitioner was, therefore, denied a fair hearing, as guaranteed by the Fifth Amendment to the Constitution of the United States.

The affirmance of the judgment of conviction of the petitioner herein was based upon the doctrine first enunciated in the *Falbo* case, 320 U. S. 549, wherein it was held that that case had foreclosed argument on the bulk of assignments of error, and particularly challenging the administrative procedure which had taken place and upon which the petitioner was deprived rights guaranteed to him before he could be criminally prosecuted.

In the case of *Estep v. U. S.*, this court held that the entire administrative action regarding purported disobedience of an order to report for induction into the armed

forces of the United States or a refusal to submit to induction entitled the draftee to resort to the courts for a review of all of the proceedings had before the Selective Service Board.

This court held that if a local Board went beyond its jurisdiction, the facts could be reconsidered on habeas corpus by this Honorable Court.

It is the contention of petitioner that in the light of the decision of this court in *Estep v. U. S.*, the previous decision of this court denying certiorari and the decision of the court in *Pacman v. U. S.*, 144 F. (2d) 562 were erroneous, and that the subsequent decision of the *Estep* case entitles this petitioner to a hearing to determine whether he is not squarely within the doctrines the court has enunciated in the *Estep* case.

The evidence shows that the petitioner applied to Local Board 228,91 for an appeal from his order of induction and requested that the induction order remain unissued until an answer was received [R. 12]. He also telegraphed K. H. Leitch, State Director of Selective Service on September 4, 1942. The wire from State Director Leitch acknowledged receipt and said that the matter would be given consideration and that he would determine appropriate action [R. 13].

The State Director did not render any decision until two days after the order of induction date. The petitioner was inducted on September 14 and the State Director rendered his decision on September 16, 1942, thus showing that the matter was then still under appeal and under consideration at the time of the induction order, and that the petitioner, therefore, could not have had any wilful intent to defy any lawful law or lawful order.

II.

The District Court and Circuit Court of Appeals Erred in Holding That the Petitioner's Conviction of the Offense Was Not Error, in View of the Fact That the Administrative Remedies Had Not Been Exhausted.

The petitioner was entitled to the exhaustion of his administrative remedies before he could be prosecuted criminally.

Section 627.41 of Selective Service Regulations provides as follows:

> "Appeal postpones induction. A registrant shall not be inducted either during the period afforded him to take an appeal to the board or during the time such an appeal is pending."

It is the fundamental rule of administrative and criminal practice that until the administrative remedy is exhausted, there is not right of prosecution.

Yakus v. U. S., 321 U. S. 414, and cases therein cited;

Bellingham Bay & B. C. R. Co. v. New Whatcom, 173 U. S. 314, 43 L. Ed. 460;

Campbell v. Olney, 262 U. S. 352, 67 L. Ed. 1021;

Wick v. Chelam Electric Co., 280 U. S. 108, 74 L. Ed. 212;

Phillips v. Commissioner of Internal Revenue, 283 U. S. 589, 75 L. Ed. 1289;

Opp Cotton Mills v. Administrator of Wage & Hour Division, 312 U. S. 126, 85 L. Ed. 624;

Falbo v. U. S., 320 U. S. 549, 88 L. Ed. 305;

Bowles v. U. S., 319 U. S. 33;

Estep v. U. S. (October, 1945, Term, No. 292);

Smith v. U. S. (No. 66).

In view of the holding of the case of *Falbo v. U. S.*, 320 U. S. 549 and *Bowles v. U. S.*, 319 U. S. 33, that one charged with violations of an order of his draft board may not challenge the validity of the order if he has failed to pursue to completion the administrative remedies provided by the Selective Service Act of 1940, we respectfully submit that where an appeal is still pending before the administrative agency, that the Government likewise has no right to proceed until the completion of the rights of the petitioner are determined under his administrative remedies.

Taking another view under the doctrine of the *Estep* and *Smith* cases, Nos. 292 and 66, 1945 Term, those cases hold that the State Director of Selective Service has the authority on his written request to require local boards to reopen and consider anew the classification of a registrant, and upon receipt of the request, the local boards shall immediately cancel any order to report for induction or for work of national importance.

Until the State Director has officially acted, therefore, upon a request made to him and which he has under consideration, the administrative remedy is not exhausted, and any prosecution based thereon, to use the language of the *Estep* case "would be lawless and beyond its jurisdiction."

Since the petitioner here has lost valuable civil rights by the conviction, which were beyond the jurisdiction of the courts to pronounce in the light of this court's sub-

sequent jurisdiction, it is respectfully submitted that the order to show cause on the petition for habeas corpus should be granted.

Under such a situation, the failure to obey an order to report for induction cannot be deemed to be wilful.

Screws v. U. S., 327 U. S. 91, 89 L. Ed. 1495.

III.

The Selective Service Regulations Require the Following Steps to Be Taken When a Registrant Is Suspected of Non-Compliance in Failing to Report for Induction:

1. The Local Board shall prepare in quadruplicate a Notice of Delinquency on Form 281 (S. S. Regulation 642.1).

2. The Local Board shall mail the original of the Notice of Delinquency to the suspected delinquent at his last known address.

3. It shall mail a copy to the State Director of Selective Service.

4. It shall post a copy in a conspicuous place for public inspection and whenever practicable, it shall give the information contained therein to the press and radio and shall encourage them to give said information the widest possible publicity.

5. It shall file the fourth copy with the date of mailing thereon.

6. If the suspected delinquent is a registrant under the jurisdiction of the Local Board (which petitioner was), the Local Board shall note in remarks column of the classification record the fact that the notice was mailed, and file the fourth copy of the Notice of Delinquency in the registrant's cover sheet.

7. After mailing the notice of delinquency, the Iocal Board *shall* wait five days before taking further action.

8. If it does not hear from the suspected delinquent during the five-day period, the Local Board shall communicate with the person whose name is listed on the applicant's registration as someone who will always know the registrant's address, and

9. Shall communicate with the employer of the applicant.

10. In no event, however, will the Local Board order or participate in the arrest of a suspected delinquent. (Section 642.2, Selective Service Regulation.)

11. The Local Board shall carefuly investigate the delinquency if the suspected delinquent has reported voluntarily to a Local Board (Section 642.3, S. S. Regulations).

12. If the Board finds that the suspected delinquent is innocent of any wrongful intent, the Local Board shall proceed to consider his case just as if he were never suspected of being a delinquent.

13. The Local Board shall report its decision to the State Director of Selective Service and shall note its decision in its records.

The above administrative procedures were not followed.

The Local Board did mail a notice of suspected delinquency to the petitioner. He replied immediately by telephone. This was September 15, 1942 [R. 17].[1] The clerk at the local board replied to petitioner that there was nothing he could do about it, that the case had already been referred to the United States Attorney and was already out of the hands of the Local Board.

This reply denied to petitioner:

1. The opportunity to have the hearings which section 642.3 requires the Local Board to give to the petitioner, and was, therefore, special, partial and arbitrary and a denial of the first of his administrative remedies.

2. It denied to the petitioner a hearing by the Local Board as to whether he had any wrongful intent.

3. The Local Board by its conduct wilfully disregarded Section 642.2, which provided that in no event will the Local Board order or participate in the arrest of a suspected delinquent, because the Local Board had already, and without any hearing, referred the matter to the United States Attorney, immediately, and before the five-day period required by the regulations issued pursuant to Congressional authority.

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[1]"By Prosecution:

Q. Did the defendant communicate with the Board in any way after that notice of suspected delinquency was mailed to him? A. He phoned one day and asked me—he wanted to come to the Board and explain the situation. I told him it was out of our hands, it was in the hands of F. B. I., we had nothing more to do with it and he was to contact them.

Q. What date was that, approximately? A. September 19th, I believe; it was the date the notice says to contact.

That is all." [R. 17, 18.]

On September 22, 1942, the State Director of Selective Service did address a letter to the Local Board, which apparently was designed to ask the Local Board to reconsider the petitioner's case [R. 18].[2]

The Local Board, without a hearing, referred the matter to the United States Attorney for prosecution and prior to the exhaustion of the requirement of 642.3.

Section 642.4, S. S. Regulations, provides:

> "Reporting delinquents to United States district attorney. (a) If the local board is convinced that a delinquent is not innocent of wrongful intent or if it is unable to locate a suspected delinquent (see Sec. 642.2), the local board shall report him to a United States district attorney for prosecution under section 11 of the Selective Training and Service Act of 1940, as amended."

Since the local board held no hearing and denied the petitioner even the right to be heard or present his showing of a lack of any wrongful intent, it could not be convinced that the petitioner was not innocent of wrongful intent and, therefore, the reference of the case to the United States district attorney prior to a hearing by the local board deprived him of the mandatory requirement of Section 642.4 of the Selective Service Training Act.

The right to notice and a hearing are fundamental bases of due process of law.

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158.

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[2]"2. On September 22, 1942, the State Director of Selective Service sent Petitioner a letter which stated: '..... We are taking the liberty of forwarding your communication to Local Board No. 228, requesting that it be included in your file for their consideration.' This letter again gave Petitioner the understanding that the justly necessary reconsideration would follow by the Local Board."

In *Powell v. Alabama,* the Court said:

> "It has never been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law. The words of Webster, so often quoted, that by 'the law of the land' is intended a 'law which hears before it condemns,' have been repeated in varying forms of expression in a multitude of decisions.", and

In *Ex parte Chin Loy You,* 223 Fed. 833, at page 835, the Court said:

> ". . . the question is whether the alien has been accorded a fair hearing by the immigration authorities. Such hearing may be, and usually is, summary and administrative, rather than judicial, in character, and need not be conducted in accordance with the procedure and rules of evidence followed in courts of law. The essential thing is that there shall have been an honest effort to arrive at the truth by methods sufficiently fair and reasonable to amount to due process of law."

The procedure followed in the instant case denied the petitioner such fundamental fairness as amounts to due process of law and his judgment of convictions was, therefore, in violation of rights guaranteed to him by the due process clause of the Fifth Amendment to the Constitution of the United States.

See, also:

Bridges v. Wixon, 326 U. S. 135.

IV.

The District Court Acted Specially, Arbitrarily and Capriciously in Denying the Petitioner an Order to Show Cause on His Application for a Writ of Habeas Corpus, Without a Hearing. The Facts Were Sufficient to Warrant the Granting of a Hearing to Permit the Presentation of All of the Evidence Attacking the Validity, and Due Process or Lack of Due Process Under Which the Judgment Was Obtained.

The right to secure an order to show cause on the presentation of facts warranting *prima facie* the granting of a writ of *habeas corpus* has been established in the courts of the United States.

In this case, the District Court denied, without a hearing, the application of the petitioner made out himself in seeking a writ of *habeas corpus.*

The petition is inartificially drawn, in the manner of a layman, but sufficient facts were set up to warrant the District Court in granting an order to show cause and holding a hearing without arbitrarily denying the petition.

Smith v. O'Grady, 312 U. S. 329, 85 L. Ed. 859.

In *Bridges v. Wixon,* 326 U. S. 155, 157, the court said:

> "But the case is different where evidence was improperly received and where but for that evidence it is wholly speculative whether the requisite finding would have been made. Then, there is deportation without a fair hearing which may be corrected on habeas corpus."

Likewise, where a person is inducted upon the receipt of evidence which was improper, the petitioner is denied a fair hearing.

Bridges v. Wixon, 326 U. S. 135.

V.

The Evidence Shows That the Defendant Was Not Guilty of Any Offense at All and, Therefore, Was Denied Due Process of Law Guaranteed by the Fifth Amendment to the Constitution of the United States. Such Denial Entitles the Petitioner to Granting of the Writ of Certiorari.

The petitioner set up in his petition facts showing that he was of a religious sect that entitled him to be fairly considered under a definite classification. He also set up facts showing that he was erroneously classified and had endeavored to get a hearing before his local board, and upon appeal.

It is respectfully submitted that the petitioner was illegally convicted and could not lawfully be brought before the court at all until not only his administrative remedies had been exhausted, but not until he had been given a full hearing before the board upon his various applications for consideration. That the petitioner was crushed under the weight of the war machine is apparent in retrospect.

The petitioner, who had acted as his own counsel throughout and endeavored to present his cause, requested the United States Attorney to give him a hearing in advance of any complaint being filed in the event that such action was contemplated. He was afforded no such hearing.

When he got into the trial court, the court felt bound by numerous decisions that held that the administrative procedure or lack of proper procedure was not reversible by the court.

This view was also taken by the Circuit Court of Appeals, which, in the second paragraph of its decision, *Pacman v. U. S.*, 144 F. (2d) 562, said:

> "On the appeal, it is conceded that the decision in Falbo v. U. S., 320 U. S. 549, S. Ct. 346, has foreclosed argument on the bulk of the assignments of error."

Hence, this is the first time that petitioner feels he has had his opportunity to present the injustices done to him by the denial of judicial review of the situation in the light of incompleteness of administrative action in his case. The petitioner further sought, but was denied judicial review of the arbitrary proceedings before the administrative board in his classification and in the order which he was charged with violating, and that such orders were special, partial and arbitrary, and denied him due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

It is respectfully requested that although the decision of this court on this writ cannot undo the time of imprisonment which petitioner has served, but that it can at least rectify a vital wrong and restore valuable civil rights to him, and clarify the law on the important question raised by this petition.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 539

MARIO JOSEPH PACMAN, PETITIONER

v.

CHARLES B. MEAD, SUPERINTENDENT OF THE FEDERAL PRISON CAMP, CORONADO NATIONAL FOREST, PIMA COUNTY, ARIZONA [1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM SUGGESTING THAT THE ABOVE-ENTITLED CAUSE HAS BECOME MOOT

The Solicitor General, on behalf of the above-named respondent, respectfully suggests to the Court that the above-entitled cause has become moot, and that the petition for a writ of certiorari

[1] The petition for a writ of certiorari is captioned "Mario Joseph Pacman, Appellant *vs.* United States of America, Appellee." The record filed with the petition bears the above caption, which is the correct one. The proceeding arose upon a petition for a writ of habeas corpus whereby petitioner sought his release from the custody of the above-named respondent (R. 1–37).

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should therefore be denied. The petition itself states (p. 3) that petitioner has "served the confinement meted out to him, and [is] under conditional release * * *." The Bureau of Prisons confirms that petitioner has served the minimum term imposed under the sentence here sought to be challenged [2] and that, pursuant to the provisions of 18 U. S. C. 710, 713, and 716b, he was released from actual custody on June 2, 1946, subsequent to the decision of the circuit court of appeals (R. 88–89). While, by virtue of the provisions of 18 U. S. C. 716b, petitioner remains on parole until the expiration of the full term of his sentence, which, according to the Bureau of Prisons will occur on December 25, 1946, he is, however, under no physical or bodily restraint from which he could be released by a writ of habeas

[2] Petitioner was sentenced to imprisonment for two years upon his conviction in the District Court for the Southern District of California of failing to report for induction into the armed forces, in violation of the Selective Training and Service Act of 1940 (R. 38–39). The conviction was affirmed by the Circuit Court of Appeals for the Ninth Circuit, 144 F. 2d 562, and this Court denied certiorari, 323 U. S. 786, No. 644, O. T. 1944. In the present case, petitioner seeks to renew the contentions he made in the earlier petition for certiorari, including the contention that his conviction was invalid because he was denied the opportunity of showing that his selective service classification was erroneous. He now relies upon the decision of this Court in *Estep* v. *United States*, 327 U. S. 114 (see Pet. 9–10). However, the rule of the *Estep* case does not apply to one who, like petitioner, failed to report for induction.

corpus. See *Baker* v. *Hunter,* 323 U. S. 740;[1] *Zimmerman* v. *Walker,* 319 U. S. 744; *Tornello* v. *Hudspeth,* 318 U. S. 792; *Ex parte Weil,* 317 U. S. 597; *Weber* v. *Squier,* 315 U. S. 810; *McNally* v. *Hill,* 293 U. S. 131, 139; *Stallings* v. *Splain,* 253 U. S 339, 343; *Wales* v. *Whitney,* 114 U. S. 564.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

OCTOBER 1946.

[1] While the *per curiam* decision in the *Baker* case, No. 151, O. T. 1944, merely states that the petition for a writ of certiorari was denied on the ground that the cause was moot, the memoranda filed by the Government show that, as in the instant case, the petitioner had been conditionally released.

U. S. GOVERNMENT PRINTING OFFICE: 1946